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Supreme Court, U.S.
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No. 04-398

In the Supreme Court of the United States

MARK GLUKOWSKY,
Petitioner,

v.

EQUITY ONE, INC., a Delaware corporation,
Respondent.

VICTOR and ELAINE YURITCH,
Petitioners,

v.

COUNTRYWIDE HOME LOANS, INC.,
d/b/a America's Wholesale Lender, a foreign corporation,
Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of New Jersey

BRIEF FOR RESPONDENT EQUITY ONE, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the Office of Thrift Supervision ("OTS") acted within its statutory authority under the "Alternative Mortgage Transaction Parity Act of 1982" when, in 1996, the OTS promulgated a regulation that authorized nonfederally chartered housing creditors to charge a fee for prepayment of an alternative mortgage loan, notwithstanding any state law prohibiting or limiting such a fee.

LIST OF PARTIES AND RULE 29.6 STATEMENT

All the parties are listed in the caption. Respondent Equity One, Inc. is a wholly owned subsidiary of Popular Financial Holdings, Inc. Popular Financial Holdings, Inc. is a wholly owned subsidiary of Popular North America, Inc. Popular North America, Inc. is a wholly owned subsidiary of Popular International Bank, Inc. Popular International Bank, Inc. is a wholly owned subsidiary of Popular, Inc. Popular, Inc. is a publicly held corporation. There is no public company that holds more than 10 percent of Popular Inc. stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 7

I. THE NEW JERSEY SUPREME COURT'S DECISION UPHOLDING THE 1996 AMT RULE DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, ANY FEDERAL CIRCUIT COURT, OR ANY OTHER STATE COURT OF LAST RESORT, AND DOES NOT WARRANT REVIEW BY THIS COURT 7

II. THE PETITION'S PURPORTED QUESTION OF FIRST IMPRESSION WAS NOT PROPERLY RAISED BY THE PETITIONER, NOT ACTUALLY DECIDED BY THE NEW JERSEY SUPREME COURT, AND DOES NOT WARRANT REVIEW BY THIS COURT 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Benay v. Ameriquest Mortgage Co., No. 00-2173, 2001WL 34120911 (D.N.J. 2001) 8, 9

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 11

Black v. Financial Freedom Senior Funding Corp., 92 Cal. App. 4th 917, 112 Cal. Rptr. 2d 445 (Cal. Ct. App. 2001) 8

Cardinale v. Louisiana, 394 U.S. 437 (1969) 11

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 9

Fidelity Federal Savings and Loan Association v. de La Cuesta, 458 U.S. 141 (1982) 9

Franklin Discount Co. v. Ford, 27 N.J. 473 (N.J. 1958) 5, 11

Glukowsky v. Equity One, Inc., 360 N.J. Super. 1 (N.J. Super. Ct. App. Div. 2003) 5, 10

Glukowsky v. Equity One, Inc., 180 N.J. 49 (N. J. 2004) ..... passim

Illinois v. Gates, 462 U.S. 213 (1983) 11

Illinois Association of Mortgage Brokers v. Office of Banks and Real Estate, 308 F.3d 762 (7th Cir. 2002) 11

McCarthy v. Option One Mortgage Corp., 362 F.3d 1008 (7th Cir. 2004) 8

Michigan v. Tyler, 436 U.S. 499 (1978) 11

Mondelli v. State Farm Mutual Automobile Insurance Co., 102 N.J. 167 (N.J. 1986) 5

Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983) 9

National Home Equity Mortgage Association v. Face, 239 F.3d 633 (4th Cir.), *cert. denied*, 534 U.S. 823 (2001) 8, 9

National Home Mortgage Association v. OTS, 271 F. Supp. 2d 264 (D.D.C. 2003), *aff'd*, 373 F.3d 1355 (D.C. Cir. 2004) 8

Shinn v. Encore Mortgage Services, Inc., 96 F. Supp. 2d 419 (D.N.J. 2000) 8, 9

Yuritch v. Countrywide Home Loans, Inc., 181 N.J. 283 (N.J. 2004) 6, 7, 9, 10

Statutes:

12 U.S.C. § 1462a(b)(2) 1

Alternative Mortgage Transaction Parity Act of 1982, Pub. L. 97-320, Title VIII, 96 Stat. 1545 (1982) 1

§ 807 (b) 1, 2

12 U.S.C. §§ 3801-06 1

12 U.S.C. § 3801(a) 2

12 U.S.C. § 3801(b) 1

12 U.S.C. § 3802(1) 2

12 U.S.C. § 3802(1)(B) 4

12 U.S.C. § 3803(a) 1, 2

12 U.S.C. § 3803(c) 1, 2, 10

12 U.S.C. § 3804 2

Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 1735f-7 ..... passim

N.J.S.A. 46:10B-2 4

N.J.S.A. 46:10B-4 4

Regulations:

12 C.F.R. § 560.34 ..... 3, 6

12 C.F.R. § 560.220 ..... 3, 6, 8

Miscellaneous:

61 Fed. Reg. 50,951 (Sept. 30, 1996)..... passim

67 Fed. Reg. 60,542 (Sept. 26, 2002)..... 6

Effect of Parity Act on Wisconsin Prepayment Penalty Statute, Op. Chief Counsel, OTS No. P-96-6 (April 30, 1996)..... 3

Sup. Ct. R. 10(b) and (c) 7, 9

STATEMENT OF THE CASE

The Petition questions the validity and preemptive effect of a federal regulation promulgated by the Office of Thrift Supervision ("OTS") in 1996 pursuant to the "Alternative Mortgage Transaction Parity Act of 1982," Pub. L. 97-320, Title VIII, 96 Stat. 1545 (1982), *codified at* 12 U.S.C. §§ 3801-06 (the "Parity Act"). The regulation at issue governs alternative mortgage loan transactions made between 1996 and 2003, and it authorizes nonfederally chartered housing creditors engaging in alternative mortgage loan transactions to charge a fee for prepayment of any loan, "notwithstanding any State constitution, law, or regulation." 12 U.S.C. § 3803(c); 61 Fed. Reg. 50,951 (Sept. 30, 1996) (the "1996 AMT Rule"). The regulation was promulgated based on the OTS's reasonable interpretation of § 807(b) of the Parity Act and 12 U.S.C. §§ 3803(a) and 1462a(b)(2).

The New Jersey Supreme Court correctly concluded that the OTS acted within its regulatory authority when it interpreted the Parity Act and promulgated the regulation at issue. Because this decision is consistent with the decisions of all other federal and state courts that have considered the validity and preemptive effect of the Parity Act and 1996 AMT Rule, the Petition should be denied.

1. The Parity Act provides nonfederally chartered housing creditors "parity with federally chartered institutions" by authorizing them "to make, purchase, and enforce alternative mortgage transactions *** in conformity with the regulations issued by the Federal agencies." 12 U.S.C. § 3801(b) ("Findings and purpose"). Prior to the passage of the Parity Act, federally chartered housing creditors could engage in so-called "alternative mortgage transactions" ("AMTs") pursuant to federal laws and regulations, but many nonfederally chartered housing creditors either were prohibited or severely restricted from

engaging in AMTs by state laws. 12 U.S.C. § 3801(a); Pet. App. 6-8.[1]

2. To ensure the Parity Act's goal of achieving parity between federal and nonfederal housing creditors, Congress directed the Federal Home Loan Bank Board ("FHLBB")[2] and two other federal agencies to "identify, describe, and publish" federal regulations governing AMTs by nonfederal housing creditors. Pub. L. 97-320, § 807(b); 12 U.S.C. § 3803(a). Congress also acted to preempt enforcement of any state law that would interfere with the ability of a nonfederal housing creditor to engage in AMTs in conformity with federal rules. 12 U.S.C. § 3803(c) (an AMT "may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation").

States were not required to participate in the Parity Act's framework for regulating AMTs. Under § 3804, any state could opt out of the Parity Act within three years of the Act's passage and avoid federal preemption of state laws and regulations. *See* 12 U.S.C. § 3804. New Jersey did not opt-out. Pet. App. 8.

3. In 1996, the OTS revised 12 C.F.R. § 560.220, the Parity Act regulation that identified and described the federal

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1 An "alternative mortgage transaction" is any loan or credit sale secured by an interest in residential real property which includes: (a) an adjustable or renegotiable interest rate; (b) an amortization schedule that is longer than the term of the loan; or (c) any similar type of terms "not common to traditional fixed-rate, fixed-term transactions." 12 U.S.C. § 3802(1).

2 In 1989, Congress amended the statute to substitute the OTS for the FHLBB.

housing creditor regulations that would be applicable to nonfederally chartered housing creditors offering AMTs. 61 Fed. Reg. 50,951. Among other things, the 1996 AMT Rule expressly granted nonfederally chartered housing creditors offering AMTs authority to charge prepayment fees according to 12 C.F.R. § 560.34, the same federal regulation that authorizes prepayment fees to be charged by federally chartered housing creditors. *Id.* By extending 12 C.F.R. § 560.34 to nonfederal housing creditors issuing AMTs, OTS clearly acted to preempt enforcement of any state law that purports to restrict nonfederal housing creditors from charging a prepayment fee as part of an AMT. Pet. App. 9-10.

4. The 1996 AMT Rule rested, in part, on the OTS's prior determination that the Parity Act preempted a Wisconsin state law that purported to prohibit state chartered savings and loans from charging a fee for prepayment of an AMT. *Effect of Parity Act on Wisconsin Prepayment Penalty Statute*, Op. Chief Counsel, OTS No. P-96-6 (April 30, 1996). The OTS determined that the state law placed nonfederally chartered housing creditors making AMTs at a competitive disadvantage vis-à-vis federally regulated thrifts, which could charge prepayment fees according to 12 C.F.R. § 560.34 (the "OTS Prepayment Rule"). Given the disparate regulation of federal and nonfederal housing creditors, the OTS concluded that the Wisconsin Prepayment Law was preempted by the Parity Act. *Id.*

5. In 1999, Petitioner Mark Glukowsky obtained a $72,000 mortgage loan from Respondent Equity One, Inc. ("Equity One"), a state chartered housing creditor, to finance the purchase of a house in New Jersey. According to the loan agreement, Glukowsky's home mortgage loan was scheduled to mature before the loan was fully amortized, resulting in a "balloon" payment at the end of the loan term

that implicitly permits interest rate adjustments. Pet. App. 2-3. Such a "balloon" mortgage loan constitutes an AMT under the Parity Act. *See* 12 U.S.C. § 3802(1)(B).

As part of the mortgage loan agreement, Glukowsky agreed to repay the loan in full if he sold the mortgaged property, and he also agreed to pay a fee if he repaid the loan in full within the first three years of the loan term. Pet. App. 3-4. When Glukowsky subsequently sold his home in April 2001, Equity One exercised its rights to demand full payment of the loan, and it charged the prepayment fee provided by the parties' loan agreement. Glukowsky paid the fee under protest. Pet. App. 3-4.

6. In May 2001, Glukowsky filed a complaint in New Jersey state court alleging that Equity One had violated New Jersey's Prepayment Penalty Law, N.J.S.A. 46:10B-2, and other statutes, by imposing and collecting the prepayment fee. Pet. App. 4. Similar to the Wisconsin Prepayment Law discussed above, the New Jersey Prepayment Law provides borrowers with a right to prepay a mortgage loan at any time without penalty and renders prepayment fees unenforceable. N.J.S.A. 46:10B-2 and 46:10B-4.

7. Equity One moved to dismiss Glukowsky's Complaint based on the preemptive effect of the Parity Act and the 1996 AMT Rule. Glukowsky opposed Equity One's motion and filed his own motion for summary judgment, arguing that the 1996 AMT Rule was invalid. The New Jersey Law Division granted Equity One's motion and dismissed the complaint, holding the New Jersey Prepayment Law to be preempted by the Parity Act and the 1996 AMT Rule. The New Jersey Appellate Division reversed the Law Division, *in part*, finding the 1996 AMT Rule to be contrary to Congress's intent in enacting the

Parity Act. *Glukowsky v. Equity One, Inc.*, 360 N.J. Super. 1 (N.J. Super. Ct. App. Div. 2003); Pet. App. 29.[3] At Equity One's request, the New Jersey Supreme Court certified the case for discretionary review. The Supreme Court reversed the Appellate Division, finding the 1996 AMT Rule to be a valid and reasonable exercise of OTS's discretionary regulatory authority. *Glukowsky v. Equity One, Inc.*, 180 N.J. 49 (N. J. 2004); Pet. App. 2, 25-26.[4]

8. In 2002, Petitioners Victor and Elaine Yuritch filed a substantially similar complaint against their housing creditor, Respondent Countrywide Home Loans, Inc., another nonfederally chartered housing creditor. The Yuritches were represented in their action by the same attorney and law firm that represented Glukowsky. As in *Glukowsky*, the Law Division granted Countrywide's motion to dismiss, and the

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3 As discussed, *infra* p. 10-11, the New Jersey Appellate Division ruled against Glukowsky and affirmed the judgment of the Law Division on a number of other issues, including issues involving the relationship between the Parity Act and Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), 12 U.S.C. § 1735f-7a.

4 After the New Jersey Supreme Court reversed the Appellate Division and affirmed the validity and preemptive effect of the 1996 AMT Rule, Glukowsky filed a nominal "motion for reconsideration," which attempted to revive the DIDA issue that was decided against him by the intermediate appellate state court. Consistent with well-settled New Jersey appellate procedure, the New Jersey Supreme Court denied this improper motion for reconsideration. *Mondelli v. State Farm Mutual Automobile Insurance Co.*, 102 N.J. 167, 174 (N.J. 1986); *Franklin Discount Co. v. Ford*, 27 N.J. 473, 491 (N.J. 1958) (failure to cross-appeal precludes a respondent from attacking an adverse portion of judgment).

Appellate Division reversed the Law Division. Based on *Glukowsky*, the New Jersey Supreme Court then summarily reversed the judgment of the Appellate Division and reinstated the decision of the Law Division. *Yuritch v. Countrywide Home Loans, Inc.*, 181 N.J. 283 (N.J. 2004); Pet. App. 28.

9. In 2002, during the New Jersey state court appeal of *Glukowsky*, the OTS reexamined the 1996 AMT Rule and eliminated the OTS Prepayment Regulation, 12 C.F.R. § 560.34, from the list of regulations prospectively applicable to nonfederally chartered institutions engaging in AMTs. Pet. App. 161 (67 Fed. Reg. 60,542 (Sept. 26, 2002), *adopting* 12 C.F.R. § 560.220 (the "2002 AMT Rule")).

10. Petitioners characterize this subsequent regulatory development as an "admission" by the OTS that its 1996 AMT Rule was *ultra vires*. Pet. 12-13. The characterization is patently inaccurate. In the agency's own words, after a full period of public comment and years of subsequent experience, the OTS simply "selected between two permissible interpretations of [the Parity Act] based upon a reevaluation of the statute." Pet. App. 196-97 (2002 AMT Rule). Accordingly, the "OTS has, in no way, concluded that the 1996 rule changes reflected an impermissible construction of its statute." Pet. App. 196-97.[5]

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5 Consistent with this determination and in order to avoid disruption to the residential mortgage industry, the OTS expressly determined that the 1996 AMT Rule should continue to apply to all AMTs made between 1996 and June 30, 2003, and that the 2002 AMT Rule should apply only prospectively. Pet. App. 196-97. Because of this determination, the issues raised by the Petition are limited to the preemptive effect of the 1996 AMT Rule as applied to transactions occurring before July 1, 2003 (the effective date

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REASONS FOR DENYING THE WRIT

The New Jersey Supreme Court correctly concluded that the OTS acted within its statutory authority when it interpreted the Parity Act and promulgated the 1996 AMT Rule. That decision does not conflict with any decision of this Court, any Federal Circuit Court, or any state court of last resort. Furthermore, one of the primary questions presented by the Petition – concerning an alleged conflict between the Parity Act and DIDA – was not properly raised before nor actually decided by the New Jersey Supreme Court. There is no conflict in the controlling law on this issue either. Accordingly, the Petition should be denied. Sup. Ct. R. 10(b) and (c).

I. THE NEW JERSEY SUPREME COURT'S DECISION UPHOLDING THE 1996 AMT RULE DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, ANY FEDERAL CIRCUIT COURT, OR ANY OTHER STATE COURT OF LAST RESORT, AND DOES NOT WARRANT REVIEW BY THIS COURT

Before the decisions of the New Jersey Supreme Court in *Glukowsky* and *Yuritch*, numerous federal and state courts uniformly recognized the 1996 AMT Rule as a valid expression of the OTS's rulemaking authority under the

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Continued from previous page

of the 2002 AMT Rule). Resolution of these limited issues would have no relevance to any transaction after June 30, 2003.

Parity Act. *See McCarthy v. Option One Mortgage Corp.*, 362 F.3d 1008, 1011 (7th Cir. 2004); *National Home Equity Mortgage Association v. Face*, 239 F.3d 633, 639-40 (4th Cir.), *cert. denied*, 534 U.S. 823 (2001); *Benay v. Ameriquest Mortgage Co.*, No. 00-2173, 2001 WL 34120911, at *3 (D.N.J. 2001); *Shinn v. Encore Mortgage Services, Inc.*, 96 F. Supp. 2d 419, 425 (D.N.J. 2000).[6]

In each of the cases, the court recognized that Congress had delegated to the OTS broad authority to regulate nonfederal housing creditors engaged in AMTs coextensive with the OTS's authority to regulate federal housing creditors. Furthermore, in each case, the court concluded that the Parity Act and the 1996 AMT Rule preempted enforcement of a state law that purported to limit AMT prepayment fees. In *Shinn* and *Benay* for example, New Jersey District Courts held that the 1996 AMT Rule preempted the same New Jersey Prepayment Law that Petitioner seeks to enforce in this case. 96 F. Supp. 2d at 424, 426; 2001 WL 34120911, at *3. Similarly, in *Face*, the Fourth Circuit declared Virginia's prepayment law to be preempted by the 1996 AMT Rule. 239 F.3d at 639-40. Most recently, in *McCarthy*, the Seventh Circuit affirmed a summary judgment declaring the Illinois Interest Act to be preempted by the 1996 AMT Rule. 362 F.3d at 1011.

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6 *See also National Home Equity Mortgage Association v. OTS*, 271 F. Supp. 2d 264, 268 (D.D.C. 2003) (upholding the 2002 AMT Rule as one of several reasonable interpretations of the Parity Act), *aff'd*, 373 F.3d 1355 (D.C. Cir. 2004); *Black v. Financial Freedom Senior Funding Corp.*, 92 Cal. App. 4th 917, 112 Cal. Rptr. 2d 445, 457 (Cal. Ct. App. 2001) (recognizing the preemptive effect of the 1996 AMT Rule as to certain state law claims).

Moreover, in *Shinn* and *Benay* and *Face*, the federal courts expressly considered and rejected many of the same arguments and issues raised here by the Petitioners and likewise resolved against Petitioners by the New Jersey Supreme Court in *Glukowsky* and *Yuritch*. For example, the federal court rejected arguments that would have limited the preemptive scope of the Parity Act to only those state laws which completely banned AMTs. *Compare Face*, 239 F.3d at 638, *and Shinn*, 96 F.3d at 425, *and Benay*, 2001 WL 34120911, at *3, *with* Pet. App. 13-14 (New Jersey Supreme Court decision) *and* Pet. 19. Likewise, each federal court rejected arguments that OTS somehow "sandbagged" the states when it promulgated the 1996 AMT Rule. *Compare* Face, 239 F.3d at 638, *and Shinn*, 96 F.3d at 425, *and Benay*, 2001 WL 34120911, at *3, *with* Pet. App. 8 (New Jersey Supreme Court decision) *and* Pet. 20-21.

Indeed, the reasoning in the *Glukowsky* and *Yuritch* decisions carefully avoids upsetting any well-settled precedents concerning the preemptive effect of federal regulations. In the interests of comity, the New Jersey Supreme Court expressly gave each of the federal decisions discussed above "due consideration" in its *Glukowsky* opinion, thereby promoting the uniform application of federal administrative law. Pet. App. 16-18 (following, *inter alia*, *Fidelity Federal Savings and Loan Association v. de La Cuesta*, 458 U.S. 141 (1982); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983)).

Given the unanimity of circuit courts and state courts of last resort concerning the validity and preemptive effect of the 1996 AMT Rule, it is clear that the Petition does not present a truly "important" federal question that must be settled by this Court at this time. Sup. Ct. R. 10(c). The

New Jersey Supreme Court's decisions in *Glukowsky* and *Yuritch* do not raise any genuine, substantial questions of constitutional law, and they similarly do not involve any substantial, unsettled questions concerning federal preemption doctrine and administrative law.

II. THE PETITION'S PURPORTED QUESTION OF FIRST IMPRESSION WAS NOT PROPERLY RAISED BY THE PETITIONER, NOT ACTUALLY DECIDED BY THE NEW JERSEY SUPREME COURT, AND DOES NOT WARRANT REVIEW BY THIS COURT

The Petition also urges this Court to issue a writ of certiorari in order to resolve an alleged statutory "conflict" between the preemption provision of the Parity Act, 12 U.S.C. § 3803(c), and a preemptive provision of DIDA, 12 U.S.C. § 1735f-7a. Pet. 6-11.

This DIDA issue was addressed by the New Jersey trial court and Appellate Division in the *Glukowsky* case and resolved against Glukowsky as being of "no significance" to the parties' dispute. Pet. App. 47-48. However, Petitioners *never* presented this issue to the New Jersey Supreme Court in the proper way, at the proper time, *via* a cross-petition for certification. Pet. App. 2-6 (recounting the procedural history of the case leading up to the New Jersey Supreme Court). Because the Petitioner abandoned the DIDA issue in the intermediate appellate court, the issue was never fully aired before the New Jersey Supreme Court.

After the New Jersey Supreme Court issued its opinion in *Glukowsky* upholding the validity of the 1996 AMT Rule, Glukowsky belatedly sought leave to revive the DIDA issue in a motion for reconsideration. That motion was properly denied in accordance with well-settled rules of New Jersey

appellate procedure. *See Franklin Discount Co. v. Ford*, 27 N.J. 473, 491 (N.J. 1958). *Cf. Michigan v. Tyler*, 436 U.S. 499 (1978) (failure to present federal question in conformance with state procedure constitutes adequate and independent grounds of decision barring Supreme Court review).

Accordingly, given the absence of full review by the state court of last resort, this Court should decline to consider the DIDA issue in the first instance. *See, e.g., Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988) (the Court reviews only issues that have been properly "pressed or passed upon" in the state court of last resort); *Illinois v. Gates*, 462 U.S. 213, 218-22 & n.1 (1983) (same); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969) (writ dismissed because petitioner failed to raise and state court failed to pass on issue).

In any event, it is clear that there is no genuine "conflict" between the Parity Act and DIDA for the reasons stated by the New Jersey Appellate Division. Pet. App. 47-49. Indeed, no court has ever recognized any kind of conflict between the Parity Act and DIDA. *Cf. Illinois Association of Mortgage Brokers v. Office of Banks and Real Estate*, 308 F.3d 762 (7th Cir. 2002) (finding no intrinsic conflict between the Parity Act and the Home Ownership Equity and Protection Act).[7] The Petition offers no compelling reason,

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7 As the New Jersey Appellate Division explained, "no aspect of DIDA is directly implicated by this case." Pet. App. 47. Although DIDA's preemption provision, 12 U.S.C. § 1735f-7a, does not preempt state limitations on prepayment fees, there is no reason why this provision should be construed to conflict with the subsequently enacted provisions of the Parity Act, which clearly do preempt state laws regarding AMTs. Pet. App. 47-49.

and there is no compelling reason, for this Court to invest its scarce resources in deciding such an unripe, hypothesized, and non-existent conflict. The Petition should be denied for these reasons also.

CONCLUSION

The New Jersey Supreme Court has not actually decided any truly important federal question in a way that conflicts with any decision of this Court or a circuit court, or another state court of last resort. There are no grounds for this Court's review and the Petition should be denied.

DATED: November 24, 2004

Respectfully submitted,

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